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Nos. 40 and 41

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1949

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants*,

v.

CAPITAL TRANSIT COMPANY, ET AL., *Appellees*.

WASHINGTON, VIRGINIA & MARYLAND COACH COMPANY, INC., ET AL., *Appellants*,

v.

CAPITAL TRANSIT COMPANY, ET AL., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE, PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA

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THE SUPREME COURT OF THE UNITED STATES

October Term, 1949

No. 40

United States of America and Interstate Commerce Commission, *Appellants*,

v.

Capital Transit Company, et al., *Appellees*.

No. 41

Washington, Virginia & Maryland Coach Company, Inc., et al., *Appellants*,

v.

Capital Transit Company, et al., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

IEF FOR THE APPELLEE, PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA

OPINION BELOW

The opinion of the District Court from which these apals are taken is not officially reported, but the opinion is

found in the record on page 252, and the findings of fact and conclusions of law are found at pages 99 to 106, inclusive, of the record.

COUNTER STATEMENT

The appellee, Public Utilities Commission of the District of Columbia (District Commission), believes the statement of the case made by the appellants in both cases does not constitute a full and fair presentation of the cases before this Court. This appellee has been furnished with a counter statement prepared by Capital Transit Company, and it accepts such statement as its own, with the following additions.

The appellants begin their statement of the case in No. 40 by asserting that the present proceeding is a sequel to *U. S. v. Capital Transit Co.*, 325 U. S. 357, in which the appellants say that this Court sustained the validity in all respects of order of the Interstate Commerce Commission fixing maximum fares between points in the District of Columbia and nearby points in Virginia, "where certain military and naval offices and installations (including the Pentagon, the Navy Arlington Annex, the Air Force Annex at Gravelly Point, and the Washington National Airport) are located" (pp. 2-3). The present proceeding, in so far as it relates to transportation by Capital Transit Company, is in a different locale. The *Capital Transit* case cited by appellants involved "interstate routes" of Capital Transit Company between points in the District and a point in Virginia. The present proceeding involves transportation by Capital Transit Company exclusively within the District of Columbia in its purely local operation, subject to and regulated by the District Commission in all of its utility services.

On page 3 of their brief, the appellants say that the number of passengers travelling daily between the District and the Virginia installations in 1945 was over 31,000 and at the

present it is about 20,000. This statement indicates that the Virginia installations may no longer "be characterized as the nerve center of the war effort in this country" (258 I. C. C. at 563) or the center of activities in "conducting a war," as this Court found at page 362 of the *Capital Transit* case. The appellants did not state that the Army witness in the proceedings before the Interstate Commerce Commission (Federal Commission) on further hearing testified that "most people leave the Army Department for reasons of much greater importance" than the matter of fares for transportation (R. 838-839), and those reasons are that "a girl is going to get married; reasons of childbirth; a new position back home; reductions in force. Those are the major reasons why people leave" (R. 839). The appellants did not state that the witness testified the Army Department had a reduction in force by reason of reductions in appropriations (R. 841). Neither did the appellants include in the statement testimony of the Army Department that since the 1945 case was tried and up to the time of further hearing there had been two increases in pay of the classified employees of approximately 33% (R. 844). Neither did they state there was another increase of $330, effective in July, 1948. Nor did the appellants include in their statement the fact that since the 1945 case was tried, there have been established along the routes of the Virginia Companies involved many dwellings and government housing projects for people employed in the District of Columbia and other places (R. 667-668, 674, 953). The appellants did not state that there is uncontradicted testimony in the record of the proceedings on further hearing that there is no need in the public interest, nor is it desirable in the public interest, that a through route be maintained between Capital Transit Company and one of the Virginia Companies (R. 640-641, 646-647).

On page 3 of their brief, the appellants say that since April 1, 1947, Capital Transit "has not operated buses in

Virginia" but that its service to the Pentagon has been through connection at a point inside the District of Columbia with a Virginia line in the same manner as its service to the other installations. The fact is, and the testimony shows, that Capital Transit Company does not undertake to render any service to Pentagon and that its operations are wholly within the District of Columbia (R. 856, 104), and that it has no common terminal with any interstate carrier nor arrangement with any other carrier for through service over its lines (R. 61, 104, 618-619, 1261).

A statement of the case should advise this Court that the service rendered within the District of Columbia to those few passengers who themselves make interstate "trips" or "journeys" to Virginia is the same in every respect, and in the same vehicles, that is rendered to all other passengers within the District of Columbia who may be making interstate "trips" or "journeys" to nearby points in Maryland or to any state in the Union and for purely local transportation. It should show that it is the identical service rendered by Capital Transit within the District of Columbia to passengers "who alight in the vicinity of New York Avenue and 12th Street, Northwest, to board interstate vehicles of the several interstate bus lines leaving those terminals, and passengers who alight from the vehicles of the Capital Transit Company at the Washington Terminal to board interstate trains, all [of whom] pay to the Capital Transit Company the fares established by [the District] Commission for transportation over the lines of the Capital Transit Company within the District of Columbia. Likewise, passengers using vehicles of Capital Transit Company to the terminal at Georgia and Alaska Avenues, Northwest, or the terminal at Wisconsin and Western Avenues, Northwest, going to points in Maryland pay the full rate of charge for transportation on the Capital Transit Company lines within the District of Columbia, even though some of those passengers ride other facilities of the Capital Transit Company

into the State of Maryland." (R. 61). A more complete statement of the facts will show that all of the passengers referred to in the preceding sentences pay the full fare fixed by the District Commission for transportation by Capital Transit Company within the District (R. 61), while those passengers using the joint fare established by the Federal Commission have the preference and advantage of a much reduced fare to the prejudice and disadvantage of all the other passengers riding vehicles of Capital Transit Company within the District of Columbia.

Under the "history of this litigation", beginning at page 3 of the appellants' brief, they should have stated that the first order of the Federal Commission dated January 18, 1944, was set aside by a 3-judge court (55 F. S. 51), and that the Federal Commission reopened the proceedings for the purpose of getting into the record evidence of the dissatisfaction of employees in the government installations in Virginia with the cost of transportation that caused separation from service and of "the importance in the conduct of the war of the work performed at the Virginia installations", and that the heads of the services immediately concerned "with the conduct of the war" are located in Pentagon and Army Annex, and that "these buildings may be characterized as the nerve center of the war effort in this country" (258 I. C. C. at 563). At the reopened hearings, after the first order was vacated, the Commission took such evidence to show that the important services were performed at the Virginia installations "in the conduct of the war" and that the Commission issued its second order "in view of the existing emergency" (258 I. C. C. at 570). It was upon these and like facts that the Federal Commission issued its report of June 12, 1944, and upon such facts that this Court affirmed that order. A correct statement would show that none of those facts exist in the record on further hearing before the Federal Commission and upon which it promulgated its order of July 7, 1948.

A full disclosure of the changed facts between the decision of this Court in the *Capital Transit* case, *supra*, and the Federal Commission's order of July 7, 1948, would show that in May, 1947, the District Commission found, after extensive investigation and hearing, that the token fare of 8-1/3¢ for transportation within the District of Columbia was inadequate and that the District Commission fixed the rate of fare at 10¢ cash and a weekly pass at $1.50 (R. 19-42). It will also show that even after such increase in rates for local transportation, that on October 1, 1948, after another full and complete investigation and hearing, the District Commission found that the cash fare of 10¢ for transportation within the District of Columbia was inadequate, and established a cash fare of 13¢, token fare of 3 for 35¢ and a weekly pass of $1.75, because a continuation at the level of earnings at that time would be prejudicial to the credit standing of the Company (R. 1244-1273). A full statement of the facts would show that the division of the fare of 5.83¢ and subsequently 7¢ established by the Federal Commission is inadequate and confiscatory in character (R. 22, 26, 31, 158, 373, 1259, 1260, 1271, 1272).

The appellants are in error in asserting that the Federal Commission considered evidence of the District Commission in establishing its joint fares and divisions in its order of July 7, 1948 (Brief page 5). The District Commission offered no evidence before the Federal Commission.

The appellants say in their statement of the case that the District Court's opinion made no mention of this Court's ruling in the *Capital Transit* case, *supra*. A more complete statement would show that the attorneys for both appellants argued that decision was either res judicata or was of such impelling nature that the issues then before the District Court would have to be decided in accordance with that opinion (R. 296-297, 300, 304-306), but that the District Court was not impressed with such argument in the light

of the new and changed facts in the record in that case and in the record now at bar.

THE ORDERS UNDER ATTACK ARE VOID FOR LACK OF JURISDICTION AND STATUTORY POWER

The District Commission believes that the Federal Commission lacked jurisdiction to promulgate its orders of May 9, 1947, and July 7, 1948, and that it no longer has statutory power to enforce its order of June 22, 1945. The District Commission will undertake to show this lack of jurisdiction and statutory power in the arguments to be presented.

The District Commission renews its "motion to affirm the judgment or, in the alternative, to dismiss the appeals" incorporated in its statement as to jurisdiction, filed in the District Court on February 18, 1949, pursuant to Rule 12 (3) of this Court.

QUESTIONS PRESENTED

The appellee, District Commission, does not believe that the first question presented by the appellants at page 2 of their brief in case No. 40 correctly states the issue before this Court. Nor does it believe that the second question stated is properly before this Court. The only question decided by the District Court is that the Federal Commission "is without jurisdiction to make the orders here in question, and that the regulatory power in respect to the matter in controversy lies with the Public Utilities Commission for the District of Columbia" (R. 252).

Other questions raised by the pleadings were neither argued nor considered by the District Court. The appellants have stated no impelling reason why this Court now

should undertake to pass upon a question of fact and law that has not been considered nor decided by the lower court.

The manner in which appellants have stated their first question might indicate that Capital Transit Company is transporting passengers into Virginia and that the issue is in the prescription of joint fares and their divisions with connecting carriers. There is no question before this Court about such fares "being an increase in the fares" theretofore prescribed, and it is not a fact that the transportation here involved represents the same transportation involved in this Court's decision of May 28, 1945 (*U. S.* v. *Capital Transit Co.*, 325 U. S. 357). Neither does the question here before this Court involve the question "where various military and naval installations are located."

Part of the transportation involved in the *Capital Transit* case, *supra*, was transportation by Capital Transit Company from 2 points in the District of Columbia to the Pentagon Building in Virginia. Mr. Justice Black, speaking for the Court in that opinion, stated "Transit Company itself conducted its own traffic to and from Virginia and District residential points as one continuous journey. * * * As carried out by Transit the arrangements were the exact equivalent of transportation on a 'through route' for a joint fare" (at page 364). But Capital Transit Company has not operated buses into Virginia since April 1, 1947. It does not have a "through route" to Virginia. The transportation involved in the case at bar is by Capital Transit Company from one point to another wholly within the District of Columbia.

The issues raised in the proceedings on further hearing before the Federal Commission (which resulted in the order of July 7, 1948, R. 125) and the pleadings before the District Court challenged the jurisdiction of the Federal Commission and raised other issues not decided below. Upon consideration of these facts and of the decision appealed from, the District Commission is led to believe that the

question now before this Court is more fairly and precisely stated as follows:

> Does the Interstate Commerce Commission have jurisdiction to prescribe street-car and bus fares for transportation by Capital Transit Company from point to point within the District of Columbia for those passengers (only) who make interstate "trips" or "journeys" to only 4 points in nearby Virginia?

As a corollary to that question, another issue was raised before the Federal Commission and in the District Court, in substance, as follows.

> Does the Interstate Commerce Commission have jurisdiction and statutory authority to prescribe street-car and bus fares for transportation from point to point within the District of Columbia to the preference and advantage of only those passengers who ride to or from the 4 Virginia points to the prejudice and disadvantage of all other passengers who ride the same street-cars and buses to and from the same points within the District of Columbia in going to or from other nearby points in Virginia, and to the prejudice and disadvantage of all other passengers who ride from point to point within the District in travelling on vehicles of other interstate carriers to nearby points in Maryland, including the government installations, and all other passengers who make interstate "trips" or "journeys"?

The District Commission found that the order of the Federal Commission constitutes a clear act of discrimination against all passengers of Capital Transit Company who make interstate trips, except those going to the 4 points in Virginia, and a preference and advantage to such passengers going to the 4 points, and is in violation of the act creating the District Commission which it is charged with enforcing (R. 60-62).

The District Commission's exceptions to the proposed report before the Federal Commission upon further hearing (R. 531-538) and the pleadings in the District Court also raised the question that the order of the Federal Commission was in violation of Section 216(d) (49 U. S. C. § 316(d)) because of undue and unreasonable preference and advantage to persons who transfer between vehicles of Capital Transit Company and the Virginia lines going to and from the 4 points in Virginia and unjust discrimination and undue and unreasonable prejudice and disadvantage to persons transferring between the lines of Capital Transit Company and the Virginia lines not going to or from the 4 points in Virginia, and to other persons transferring between vehicles of Capital Transit Company and vehicles of interstate transportation agencies in the District of Columbia. But the lower court did not consider that question.

SUMMARY OF ARGUMENT

1. The judgment appealed from is not in conflict with U. S. v. Capital Transit Co., 325 U. S. 375. The facts and circumstances in the record on further hearing is quite different from the facts considered in that case. The District Court applied to the changed facts and circumstances the principles this Court has followed in an unbroken line of decisions from Cooley v. Board, 12 How. 299 to Panhandle Eastern Pipe Line Co. v. P. S. C., 332 U. S. 507. The transportation here involved is from point to point within the District of Columbia and does not come within the definition of "interstate commerce" as defined in Section 203 (a)(10), and is too unrelated to interstate commerce to constitute a part thereof under applicable decisions of this Court. It does not burden interstate commerce or obstruct its free flow.

2. The facts and circumstances shown by the Federal Commission in its 1944 reports, which this Court affirmed in the Capital

Transit case, are so different from the facts and circumstances shown in the record on further hearing that the Federal Commission has been stripped of any basis for removing the transportation involved from the exemption of Section 203 (b)(8) of the Act. When the 1944 reports were rendered, Capital Transit Company was operating into the State of Virginia, over its own interstate route which this Court found constituted a through route, and under joint rates at a time when this country was in the prosecution of a war. The significance of these facts are pointed out by the Federal Commission in its 1944 reports and this Court in its opinion in the Transit case. The absence of such facts on further hearing are of equal importance. The facts upon further hearing do not, as a matter of law, support the order of July 7, 1948, promulgated by the Federal Commission.

3. The proviso in Section 216 (e) of the Act denies the Federal Commission power to prescribe or in any manner regulate rates for intrastate transportation or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose whatever. This proviso was incorporated for the specific purpose of denying to the Federal Commission powers it asserted in the regulation of intrastate rates for railroads.

4. The Act creating the Public Utilities Commission of the District of Columbia, 37 Stat. 974, gave it the exclusive regulatory power over the conveyance of persons or property within the District of Columbia for hire. The Act vested in the District Commission and divested the Federal Commission of powers which it formerly possessed and it was provided that the District act should be so construed as to be free from conflict with provisions of the Constitution, the Interstate Commerce Act and other federal acts then in force. The history of the legislation of the Motor Carrier Act clearly shows an intent that powers traditionally within the domain of local regulation should remain free from restraint by federal powers, except under emergency conditions.

5. Section 203 (b)(8) of the Motor Carrier Act exempts from

its application transportation in a municipal zone except on specific findings that its removal from the exemption is required to carry out the national transportation policy. The history and the legislation indicates that to remove the exemption, a carrier had to be "transporting" in interstate commerce over the entire length of such "interstate route or routes in accordance with the laws of each state having jurisdiction." Capital Transit Company does not transport passengers into Virginia; it has no interstate route into Virginia; and it cannot operate in that State in accordance with its laws. The transportation here involved is wholly urban transportation and the Motor Carrier Act was not designed to apply to urban transportation. Congress did not use in Section 203 (b)(8) the broad and comprehensive language it used in other sections of the Motor Carrier Act when it was referring to "interstate commerce" as those words are defined in the Act. The exception to the exemption is limited solely to "transportation" in interstate commerce and does not apply to transportation here involved.

6. Even if Section 203 (b)(8) of the Act applied to the transportation involved, the order of the Federal Commission of July 7, 1948, is so lacking in basic or essential findings and evidence to support necessary findings, that the order is void. The order of July 7, 1948, contains deductions, inferences and conclusions without disclosing evidence upon which they could be predicated and is lacking in essential findings to support the conclusions stated. The ultimate conclusions stated by the Federal Commission are lacking in those findings necessary to show every element to bring the transportation here involved within Federal control. The conclusions stated do not measure up to that high standard required by the decisions of this Court for the exercise of federal power in the area that is traditionally within the domain of state power. They fall squarely within the condemnation of decisions of this Court.

7. The report of July 7, 1948, shows that for the four-month period, June to September, 1947, the revenue received by Capital Transit Company from the transportation here involved "was 1.09

percent of total revenue from District operations during the same period." The insignificant volume of traffic reflected by this finding of the Federal Commission does not bear that close and substantial relationship to interstate commerce upon which this Court has held that intrastate activities burden it or obstruct its free flow. It does not bear that close and intimate relationship with interstate commerce that this Court has many times found would constitute a burden upon commerce. The transportation by Capital Transit Company here involved is wholly incidental to its local transportation and is too remote and unrelated to interstate commerce as to come within federal regulation.

8. The appellants in case No. 40 attempt to raise before this Court the question of confiscation which was neither considered nor acted upon by the court below. They advance no impelling reasons why this Court should pass upon the question. The testimony of record in the proceedings on further hearing show that at a time when the Federal Commission established a division of fare of 5.83¢ to Capital Transit Company and at a later date, 7¢ that Company was making an inadequate return on its property. During two months of 1947, when the division of 5.83¢ was in effect, Capital Transit Company failed to meet its operating expenses by $60,883 and was still faced with interest charges of a considerable amount. After a complete investigation and hearing, the District Commission authorized Capital Transit Company to abolish a token fare and establish a cash fare of 10¢ in May, 1947. After a year's operation, another investigation showed that the Company's earnings were still inadequate and the District Commission raised the cash fare from 10¢ to 13¢, at a time when the Federal Commission had prescribed the division of fares for transportation within the District of Columbia of only 7¢. The uncontradicted testimony of Capital Transit Company's Vice President and Comptroller before the Federal Commission shows that the revenues received from the division of joint fares were insufficient to meet the costs incurred and to provide a fair return on the property used in public service.

ARGUMENT

Transportation from Point to Point within the District of Columbia is Not "Interstate Commerce" as Defined in Section 203(a)(10), and Under the Applicable Decisions of this Court is of Such Local Concern and Character as to Require Local Regulation.

The judgment of the District Court is not in conflict with *U. S. v. Capital Transit Company*, 325 U. S. 357. When the underlying facts of that case are contrasted with the underlying facts on further hearing resulting in the order of July 7, 1948, it is found that the judgment appealed from is in keeping with the principles of that decision. The judgment reflects a direct application of the principles pronounced by this Court in *U. S. v. Yellow Cab Co.*, 332 U. S. 218, and *Pennsylvania R. Co. v. Knight*, 192 U. S. 21, 48 L. Ed. 325, and an unbroken line of decisions, none of which is in conflict with the decision in the *Capital Transit* case. The judgment appealed from is the application of the well-established principles stated by this Court in *Wilson v. The Black Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. Ed. 412 and *Cooley v. Board*, 12 How. 299, 13 L. Ed. 996, and followed right down to the recent decision in *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U. S. 507.

It is true that under other or dissimilar facts, this Court has charted other courses equally clear. In relying upon the authorities cited by the Federal Commission in its orders here under attack, that body has been detoured by failing or refusing to recognize the nonexistence of facts upon which the Court rested its decision in *U. S. v. Capital Transit Co.*, 325 U. S. 357. In bringing this appeal, the appellants have either misunderstood the facts and the application of the established principles to those facts, or they have blindly shut their eyes to changed facts and circumstances and seek to follow a course charted under different facts and leading to a wholly different principle.

The judgment of the District Court finds support in *Pennsylvania R. Co.* v. *P. U. C.* (*Ohio*), 298 U. S. 170; *Pennsylvania R. Co.* v. *Knight*, 192 U. S. 21, 48 L. Ed. 325; *The Minnesota Rate Cases*, 230 U. S. 352, 398, 402; *Southern Pacific Co.* v. *State of Arizona*, 325 U. S. 761; *Port Richmond Ferry* v. *Hudson County*, 234 U. S. 317; *Duckworth* v. *State of Arkansas*, 314 U. S. 390; *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346; *Eichholz* v. *P. S. C.*, 306 U. S. 268; *State of North Carolina* v. *U. S.*, 325 U. S. 507, and many other decisions of this Court.

The position of the District Commission is clearly stated in the foregoing and other similar decisions. In some of the authorities cited will be found facts which have charted a course requiring federal regulation. But in such instances, it has been done upon the application of the general rule to the facts there involved. To illustrate, the principle contended for by the District Commission is stated in *Southern Pacific Co.* v. *State of Arizona*, *supra*, but, as pointed out by the late Chief Justice Stone in that case, the matters for ultimate determination are the nature and extent of the burden there imposed by state regulation upon interstate commerce, and whether the relative weights of one against the other are such as to make inapplicable the rule that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the Commerce Clause from state interference. Upon the facts of that case, in applying the applicable rule, the Court found that the state burden imposed upon interstate commerce outweighed the advantages of local or state regulation. This represents one of those cases where, because of the facts in the case, a course has been charted different from the *Cooley* principle. The appellants have misunderstood the facts and reasons leading to the two distinct doctrines.

This is illustrated by the Federal Commission's resting its jurisdiction upon *Baer Bros. Mercantile Co.* v. *Denver &*

R. G. R. Co., 233 U. S. 479, and *Rush Common Carrier Application*, 17 M. C. C. 661. It refused to give recognition to the difference in the facts in the *Baer Bros.* case and the facts of the case at bar and the reasoning of the Court in that case. The attorneys for the appellants seem to have recognized the weakness of the foundation of the Federal Commission's decision and in their brief completely ignored the *Baer Bros.* case and *Rush Common Carrier* case. They have sought other reasons to sustain the orders of the Federal Commission.

In the *Baer Bros.* case, Baer Bros., located in Leadville, Colorado, entered into a contract with a brewing company in St. Louis, Mo., for beer to be shipped from Missouri to Colorado under an "arrangement" whereby each car of beer was delivered by the Missouri Pacific Railroad to the Rio Grande Railroad "with an expense bill which described the shipment and disclosed the charges paid by or due to the Missouri Pacific." The Rio Grande then forwarded the car, "naming the Missouri Pacific as consignor and the Baer Company as consignee." This Court held in that case that there was in fact "a through shipment from St. Louis, Missouri, to Leadville, Colorado," and that when goods shipped from a point in one state to a point in another state are received in transit by a state common carrier under a "conventional division of the charges," such carrier shall be deemed to have subjected its road "to an arrangement for a continuous carriage or shipment." The Court further said a common "arrangement" between the two carriers was shown by the long-continued course in dealing, and the division of the charges, with the knowledge that it had been paid as compensation for the "single haul." The facts in that case clearly show that the shipment involved was an interstate shipment, so understood by all of the parties, including the railroad carriers, and the separate charges collected by one company or the other and divided between them under an "arrangement" that had

long been in practice. The facts of the *Baer Bros.* case are completely different from the facts and circumstances shown in the record on further hearing in the case at bar.

In *Rush Common Carrier Application*, 17 M. C. C. 661, also relied upon by the Federal Commission, Rush was under a contract to haul ore and concentrates from the mines to the interstate railroad station, from which point "the ore moves generally to points outside of Idaho." Under the contract he was also required to haul machinery and supplies moved to the station by rail "generally from points outside the State." The contract required Rush to load the ore and concentrates at the mine and reload the same into suitable cars on the tracks of the interstate rail carrier. In that case, the Federal Commission found that from "the time of the movement of the ore is commenced it is intended for an interstate destination and is carried by applicant by truck and loaded by him into cars at the rail station in furtherance of that intention." (17 M. C. C. 661, 664). In a reluctant concurring opinion with the result reached, Chairman Eastman pointed out that Rush started the ore and concentrates on a journey which he *knew to be interstate* with "a definite intention on the part of the consignor that they shall move through to a destination in another State." (p. 678). Chairman Eastman, the outstanding authority in this field, was careful to point out the local character of certain transportation which should be considered intrastate rather than interstate, even though such transportation is related to interstate movement. He said:

> "Many illustrations come to mind, such as the taxi, bus, or street car which takes the interstate passenger and his baggage to the railroad station, or the local carter who does the same with his trunk, or even the messenger or carter who takes letters or parcels to the post office and mails them to a destination in another State. * * *
>
> "That there are many motor carriers which perform such an 'independent local service, prelimi-

> nary or subsequent to any interstate transportation,' a service which may have a 'close relation to interstate commerce' but is nevertheless 'not properly to be regarded as a part of it,' I have no doubt. Nor do I doubt that such service should be subject to local rather than national regulation." (p. 682).

Chairman Eastman cited *Pennsylvania R. Co. v. Knight*, 192 U. S. 21, and said the Court's reference to "independent local service, preliminary or subsequent to any interstate transportation" was based "on sound reason and has a peculiar pertinence to certain phases of motor-carrier transporation." (p. 681). He said "local" transportation, even when related to or associated with interstate commerce, is "not of any national consequence," and that its regulation by the Federal government "is in no way necessary for the proper protection of interstate or foreign commerce." (p. 682).

Capital Transit Company does not have an "arrangement" whereby it undertakes to transport a passenger from the District to either of the Virginia companies operating into Virginia (R. 104, 618, 619, 1261). It makes no contract with its passengers to transport them beyond the end of its line in the District of Columbia. Under orders of the District Commission, it has no authority to make such contracts or to engage in such transportation.

The interstate "trips" made by passengers who ride the vehicles of Capital Transit Company are made by entering vehicles of the Virginia companies within the District of Columbia and being transported by the Virginia companies over *their* "interstate routes" to points in Virginia. The same is true of the return trips. The passengers board the vehicles of the Virginia companies in Virginia and alight from them within the District of Columbia. Consequently, the "interstate transportation" is performed by the Virginia companies, not by Capital Transit Company.

The Federal Commission said that *U. S. v. Yellow Cab Co.*, 332 U. S. 218, does not support Capital Transit's position. The Commission failed to distinguish between the decisions under Part II and Part III of that case. In Part II, which the Federal Commission must have considered to reach its conclusion, the transportation involved was from one train to another train by taxicab as part of an interstate train trip, usually paid for as part of a single train fare. It should be obvious to any one that such transportation is interstate. But the Commission failed to recognize that the transportation involved in Part III was similar in nearly all respects to the transportation by Capital Transit Company in the case at bar, that is to say, transportation by taxicab from or to home, office or hotel from and to interstate railway stations, which the Court said "is too unrelated to interstate commerce to constitute a part thereof." When the Federal Commission said that Capital Transit Company's position was not supported by the *Yellow Cab* case, it could not have meant the decision in Part III of that case. The facts at bar and those involved in Part III of the *Yellow Cab* case are parallel. The Federal Commission has failed to recognize the distinction the Court made between interstate "service" of a carrier and an interstate "trip" of a passenger.

The appellants contend on page 19 of their brief in case No. 40 the inappositeness of the *Yellow Cab* case is clearly shown by the fact that taxicab service is expressly excluded from the purview of the Interstate Commerce Act by Section 203(b)(2). But they fail to state that the decision in Part III was that the "service" rendered was not "interstate service." The Court's decision was not based upon the question whether taxicabs were or were not subject to Part II of the Interstate Commerce Act. That question was not before the Court.

The *Yellow Cab* case did not involve the Interstate Commerce Act, but the Court did hold in that case that in so far

as the complaint under the anti-trust laws involve transportation by taxicabs between stations in commerce that is clearly interstate, the complaint "states a violation of the Sherman Act in this respect" (p. 229). Under Part III of the *Yellow Cab* decision, which involved transportation by taxicabs to and from railroad stations to and from homes, offices and hotels, identical with the operation performed by Capital Transit Company involved in the case at bar, where it was "intermingled with the admittedly local operations" of the taxicabs that "such transportation is too unrelated to interstate commerce to constitute a part thereof" (p. 230). The late Mr. Justice Murphy, speaking for the Court, stated that these taxicabs "admittedly crossed no state lines; by ordinance, their service is confined to transportation 'between any two points within the corporate limits of the City'" (pp. 230-231). Under Part III of the *Yellow Cab* case, the Court held that the complaint stated no violation of the anti-trust laws. It is obvious from the foregoing that such consideration as was given by the Federal Commission to the *Yellow Cab* case related to that transportation under Part II which was from one train to another train as part of an interstate train trip, and in many instances paid for by the same interstate train fare.

In its report of July 7, 1948, the Federal Commission quotes two excerpts from the *Yellow Cab* case. It said that the transportation here considered "clearly falls within the category described in the first excerpt" from the *Yellow Cab* case, (270 I. C. C. at 656). The excerpt which the Federal Commission relied upon and compared with the transportation involved in the case at bar was the transportation referred to under Part II of the *Yellow Cab* case, which involved transportation from one railroad station to another railroad station in a purely interstate train trip. The excerpt quoted and relied upon by the Federal Commission is found on pages 228-229 of that decision. The only transportation involved in the *Yellow Cab* case that is

parallel to the transportation here involved is that discussed by the Court under Part III.

The consideration of the different character of the commerce involved under Part II and that involved under Part III in the *Yellow Cab* case is consistent with decisions of this Court. This Court has consistently held that in many matters the exercise of local or state action may affect, burden, and impede interstate commerce without running afoul of constitutional prohibitions. That has been the rule where the exercise of state power does not discriminate against interstate commerce (*S. C. State Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 189; *California* v. *Thompson*, 313 U. S. 109; *Dixie Ohio Express Co.* v. *State Revenue Com.*, 306 U. S. 72, 78; *Aero Mayflower Transit Co.* v. *Georgia P. S. C.*, 295 U. S. 285); where uniformity is not required (*Hartford Accident & Indemnity Co.* v. *Illinois*, 298 U. S. 155); where because of the local character, the number and diversity of matters, local control is required for safety, health and well being without impairing uniformity of control over commerce in matters of national concern and without materially obstructing the free flow of commerce (*Barnwell Bros.* case, *supra*, at page 185; *Duckworth* v. *State of Arkansas*, 314 U. S. 390; *California* v. *Thompson*, *supra*; *Parker* v. *Brown*, 317 U. S. 341, 363); where state action does not infringe the national interest (*California* v. *Thompson*, *supra*, at page 116; *Federal Compress & Warehouse Co.* v. *McLean*, 291 U. S. 17, 23); or where the exercise of state action has no such intimate connection with interstate commerce as to burden it (*Leonard* v. *Earle*, 279 U. S. 392; *U. S.* v. *Yellow Cab Co.*, *supra*, at page 230, 231, 232; *Williams* v. *Fears*, 179 U. S. 270, 278, 45 L. ed. 186, 190).

In its report of January 18, 1944, the Federal Commission said the transportation involved "is urban, mass transportation between points in the District and points in Virginia just beyond the District-Virginia line, and is the same

in all essential characteristics as the transportation betwee residential areas of the District and commerce and gover ment establishments in the District" and that the Virgini installations "represent to all intents and purposes an e tension of the main business area of Washington" (2 1, C. C. at page 782). The national transportation poli has never been construed to relate to "urban transport tion." The quoted finding from the Federal Commission report was at a time when Capital Transit Company wa "engaged in transportation" into the State of Virgini There is a complete absence in the record on further hea ing of any fact or finding which shows that transportatio from point to point within the District of Columbia has an relation to the national transportation policy as define There is a complete absence of finding of the effect of loc transportation upon interstate commerce. In *A. L. A Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495, 544, M Chief Justice Hughes, speaking for the Court, said th power of Congress extends to the protection of interstat commerce from injury. He quoted from *Mondou* v. *N. Y N. H. & H. R. Co.*, 223 U. S. 1, 51, that it is the "effect upo interstate commerce" which is the criterion of congres sional power. In the *Schechter* case, the Court pointed t its holdings in decisions dealing with common carriers en gaged in both interstate and intrastate commerce to th effect that the dominant authority of Congress necessaril embraces the right to control their intrastate operations i all matters "having such a close and substantial relatio to interstate traffic that the control is essential or appro priate to secure the freedom of that traffic from interferenc or unjust discrimination and to promote the efficiency of th interstate service." When this Court referred in the *Schechter* case and other cases to which it alluded to th power of Congress to control intrastate operations having such a close and substantial relation to interstate com merce, it was not talking about "urban transportation."

The Court there said that in determining how far the Federal government may go in controlling intrastate transactions, upon the ground that they "affect" interstate commerce, it pointed out that there is a necessary and well established distinction between direct and indirect effects. It said the "direct effects" are illustrated by the railroad cases it had cited (page 546). It also said the distinction between the "direct" and "indirect" effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one essential to the maintenance of our constitutional system (p. 548).

In *Connecticut Light and Power Co.* v *F. P. C.*, 324 U. S. 515, this Court said federal authority should appear affirmatively and not rest on inference alone, and that when a denial of jurisdiction was stated, it meant the jurisdiction did not exist. In *Southern Pacific Co.* v. *State of Arizona*, 325 U. S. 761, Mr. Chief Justice Stone, speaking for the Court said that when regulation of matters of local concern is local in character and effect and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority (p. 767). He also said that there has been left to the states wide scope for the regulation of matters of local concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across the state lines or interfere with it in matters with respect to which uniformity of regulation is of predominant concern.

The question of uniformity of regulation is not involved in the case at bar. The intra-District transportation of passengers making interstate trips could not have much effect upon the national transportation policy or seriously affect the free flow of commerce as demonstrated by the Federal Commission in the Matter of Exemption of Passenger Carriers in Washington, D. C., Commercial Zone. In

a petition signed by the attorneys for appellants in case No. 41, on behalf of another carrier, the Federal Commission denied on July 29, 1949, a petition to apply Section 203 (b)(8) to transportation between the District of Columbia and Maryland "for the reason that it fails to set forth sufficient grounds to justify the relief sought."

This Court has many times said that Congress, in legislating within its constitutional authority, will not be deemed to have intended to strike down state authority acting in the public interest unless its purpose to do so is clearly manifested (*Southern Pacific Co.* v. *State of Arizona*, 325 U. S. 761, 766; *Reid* v. *State of Colorado*, 187 U. S. 137, 148, 47 L. ed. 108; *People of State of California* v. *Zook*, 336 U. S. 725; *Napier* v. *A. C. L. Railway Co.*, 272 U. S. 605, 611); or unless the conflict with acts of Congress plainly and palpably infringes its policy (*Southern Pacific Co.* v. *Arizona, supra*, at page 766; *Townsend* v. *Yeomans*, 301 U. S. 441, 454; *Savage* v. *Jones*, 225 U. S. 501, 533; *A. T. & S. F. R. Co.* v. *Railroad Com. of California*, 283 U. S. 380, 391).

In *Terminal Railroad Assn.* v. *Brotherhood of Railroad Trainmen*, 318 U. S. 1, at page 8, this Court said that even though state regulation may in some measure retard and increase the cost of a movement in interstate commerce, it does not mean that the state action is necessarily invalid where the state action was taken in the interests of the citizens of the state. In *Parker* v. *Brown, supra*, at page 367, Mr. Chief Justice Stone said for the Court that legislation to prevent the demoralization of an industry by stablizing the marketing of the raisin crop is a matter of state as well as national concern, and that in the absence of inconsistent congressional action, "is a problem whose solution is peculiarly within the province of the state." This Court held that the state statute was a regulation of state industry "of local concern which, in all the circumstances of this case which we have detailed, does not impair national control over the commerce in a manner or to a degree forbidden

by the Constitution" (p. 368). In *The Minnesota Rate* cases, 230 U. S. 352, this Court said the power of Congress to regulate commerce among the states is supreme and plenary, but the Court quoted from *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, where the Court said federal power is to be appied to all external concerns of the nation and to those internal concerns which affect the states generally—

> "* * * But not to those which are within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself" (p. 398).

In *Kelly* v. *State of Washington*, 302 U. S. 1, this Court said that under our constitutional system, states are able to deal with local exigencies. It said their police power is superseded only where the repugnance or conflict with federal power "is so direct and positive" that the two acts cannot "be reconciled or consistently stand together." In *City of Yonkers* v. *U. S.*, 320 U. S. 685, Mr. Justice Douglas, speaking for the Court, said that in the application of the doctrine of the *Shreveport* case, 234 U. S. 342, this Court has required the Federal Commission "to show meticulous respect for the interests of the States. It has insisted on a 'suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear'" (p. 690). The Court also said that the principle of *Florida* v. *U. S.*, 282 U. S. 194, was applicable in the *City of Yonkers* case. What the Court there said about the lack of basic or essential findings is peculiarly applicable to the Federal Commission's order of July 7, 1948. This Court has spoken to like effect in *Davies Ware-*

house Co. v. *Bowles*, 321 U. S. 144, 152; *Palmer* v. *Commonwealth of Mass.*, 308 U. S. 79, 84, and other decisions.

The attempt of the Federal Commission to tack the interstate "trips" of certain passengers going to the State of Virginia to the local transportation by Capital Transit Company within the District of Columbia is somewhat similar to the effort of the railroad in *Pennsylvania R. Co.* v. *P. U. C.* (Ohio), 298 U. S. 170. There a coal company shipped coal from its mines in Pennsylvania to a plant in Negley, Ohio, where it was processed, and from which point it was loaded onto cars for shipment. Four cars of such coal were offered to the Pennsylvania Railroad for distribution in the Youngstown, Ohio, switching yard. The railroad refused to move the cars except at charges on file with the Federal Commission. The connecting road filed complaint with the Ohio Commission which held that it had jurisdiction and ordered Pennsylvania Railroad to perform the switching services at the rate established by it. Mr. Justice Cardoza, speaking for the Court, said:

> "First. The transportation of the coal from Negley, Ohio, to Youngstown in the same state, was an intrastate service, not subject to the provisions of the Interstate Commerce Act, and its character in that regard was not changed because of the preliminary carriage from the Pennsylvania mines in barges and cars belonging to the shipper" (p. 173).

The railroad contended that from the moment the coal left the mines in Pennsylvania there was a continuing intention to deliver it to consumers in another state, and that the movement was "interstate commerce." This Court by unanimous decision disagreed. The Court said that the railroad would have it hold that this interstate transportation by the coal company, who does not carry for anyone else—

> "* * * will be tacked to the intrastate transportation by railroads who are in business as common carriers, and the movement thus consolidated brought within the statute. The statute and the decisions as we read them forbid this unifying process" (p. 175).

The Facts and Circumstances Upon Further Hearing are Wholly Different from the Facts in the 1944 Orders of the Federal Commission and Before this Court in 1945.

In its order of July 7, 1948 (R. 125), the Federal Commission and the appellants in their brief in the case at bar have reversed their positions as to the basis upon which the Federal Commission's orders must be predicated. In its first report of January 18, 1944 (256 I. C. C. at 782), the Federal Commission said its "decision herein must be predicated also upon the facts and circumstances at present known." The District Commission believes that the order of July 7, 1948, "must be predicated also upon the facts and circumstances at present [then] known."

When the Federal Commission properly stated on January 18, 1944, that its decision must be predicated upon the facts and circumstances then known, and after its order was set aside for failing to state sufficient basic facts, and it reopened the proceedings and issued its order of June 12, 1944 (258 I. C. C. 559), it had the basic facts and made essential findings which this Court found was sustained by substantial evidence. Because the Federal Commission said the facts and circumstances in the case before this Court in 1945, and before it in its order of July 7, 1948, were substantially the same, and since the appellants in their brief have contended that this Court has adjudicated the issues involved in the case at bar, the District Commission believes the facts and circumstances known and stated by the Federal Commission involved in the 1945 decision of this Court should be contrasted with the changed facts and circum-

stances established on further hearing and known to the Federal Commission when it issued its report of July 7, 1948.

In the record of the proceedings upon which the order of January 18, 1944, was predicated, "the facts and circumstances at present [then] known" to the Federal Commission were found and stated by it to be that: (1) Capital Transit Company operated its buses from two points in the District of Columbia to Pentagon; (2) the service to Pentagon "was instituted at the urgent request of the War Department in order to furnish needed transportation" (256 I. C. C. at 771); (3) that both the War and Navy Departments "offered considerable evidence intended to show the dissatisfaction of their employees with the fares which they are required to pay" and "to indicate the large turnover in personnel which is alleged to be due to such dissatisfaction" (256 I. C. C. at page 776); (4) that the carriers had experienced a large increase in traffic "during the present war emergency" (256 I. C. C. at page 781); (5) "The primary reason set forth by the Departments for the institution of this investigation was the large turnover of employees in the Virginia installations" (256 I. C. C. at page 783); (6) "Through routes are now in effect" between Capital Transit and the Virginia lines (256 I. C. C. at page 783); (7) "In view of the existing emergency" the fares found reasonable "should be made effective as soon as practicable" (256 I. C. C. at page 784); (8) as a result of those emergency conditions and facts, it directed that its order would "provide for not less than 15 days' notice instead of the usual 30-day period" (256 I. C. C. at page 784).

When the District Court reversed the order of January, 1944, the Federal Commission reopened the proceeding, and as a result thereof, additional facts and circumstances became known to it. From such reopened record it knew and stated in the June 12, 1944, report (1) "that most of the em-

oyees" at the Virginia installations were in clerical ades at salaries of $1440 to $1620 (258 I. C. C. at page 3); (2) that the government departments adduced evi- nce which further emphasizes the "importance in the nduct of the war of the work performed at the Virginia tallations" (258 I. C. C. at page 563); (3) that the offices the Secretary of War, Chief of Staff of the Army and the ads of the services "immediately concerned with the con- ct of the war are located in the Pentagon and the Army nex" (258 I. C. C. at page 563); (4) that "these build- gs may be characterized as the nerve center of the war ort in this country" (258 I. C. C. at page 563); (5) that necessarily followed from suddivision (7a) of Section 3(b) that subjecting transportation to the provisions of at section was specially recognized as action that may rve the national policy to the "end of developing, coordi- ting, and preserving a transportation system 'adequate meet the needs of the commerce of the United States * * * d of the national defense'" (258 I. C. C. at page 564);) that to insure fares that do not exceed a level operating ainst the full efficiency "of the important services per- rmed at the Virginia installations in the conduct of the r, it is essential that the fares be subjected to regulation" 58 I. C. C. at page 564); (7) that the existing fares were ving an affect detrimental "to such services" (important rvices in the conduct of the war) (258 I. C. C. at page 4); it stated (8) that Section 203(b)(8) does not apply less the motor carrier "is also lawfully engaged in the in- astate transportation of passengers over the entire length such interstate route or routes in accordance with the ws of each State having jurisdiction" (258 I. C. C. at page 5); it stated in its findings and conclusions (9) "That in w of the existing emergency, the fares found reasonable ould be made effective as soon as practicable and that our der should provide for a period of not less than 10 days' tice instead of the usual 30-day period" (258 I. C. C. at

page 570). In the first order it reduced the time of notice from 30 to 15 days, but the emergency was urgent enough to reduce the notice to 10 days in the June order.

The changed facts and circumstances, shown in the record on further hearing, resulting in the order of July 7, 1948, strips the Federal Commission of every basic ground upon which it asserted jurisdiction under the facts existing in 1944. The facts on further hearing do not, as a matter of law, support the order.

In contrast with the facts and circumstances in 1944, the facts upon which the order of July 7, 1948, "must be predicated" and matters of which this Court is asked to take judicial notice, are that:

(1) Capital Transit Company did not operate into Virginia; (2) "Through routes" into Virginia are not "now in effect" as the Federal Commission found at 256 I. C. C. page 783, and as this Court found in the *Capital Transit* case at page 364; (3) It was not true then that "Transit Company itself conducted its own traffic to and from Virginia and District residential points as one continuous journey," as this Court found at page 364; (4) Capital Transit Company is not now furnishing "needed transportation", or any transportation, to Pentagon as the Federal Commission found at 256 I. C. C. page 771; (5) There is no "urgent request of the War Department" for Capital Transit Company to furnish transportation to Pentagon, as the Federal Commission found at 256 I. C. C. page 771; (6) The Federal Commission which has power to require carriers subject to its regulation to render service and to extend service has not ordered Capital Transit to transport passengers to Pentagon; (7) There is no evidence in the record on further hearing "to show the dissatisfaction of their employees with the fares which they are required to pay" to reach government installations, as the Federal Commission found in 256 I. C. C. page 776; (8) There is no "large turnover of employees" which is due to dissatisfaction with

fares, and, on the contrary, the witness for the Army testified that the question of fares was "not the biggest factor" (R. 848, 849) in recruiting employees in the low-paid scale, but that the "reasons of much greater importance" and the "major reasons" for such failure were other causes (R. 839), including a reduction in appropriations (R. 841); (9) There was no such thing as the "present war emergency" or the "existing emergency" on July 7, 1948, that the Federal Commission found in its 1944 reports; (10) The testimony of the witness for the Army was that low-salaried employees who were getting $1,440 to $1,620 in 1944 had two increases in wages at the time of the further hearing, amounting to an increase of 33% (R. 844). This Court is asked to take judicial notice of the fact that another increase of $330 in wages was made effective in July, 1948, after the record on further hearing had closed; (11) None of the Virginia installations can now be characterized "as the nerve center of the war effort in this country" as the Federal Commission found in 258 I. C. C. at page 563, and "in the very center of activities essential" in "conducting a war" as this Court found at page 362 of the *Capital Transit* case, *supra*.

In view of the absence of the basic facts upon which the Federal Commission issued its report of June 12, 1944, and upon which this Court affirmed its order, and in the light of the changed facts and circumstances shown by the record on further hearing, the facts now known and existing do not, as a matter of law, support the order of July 7, 1948. In *I. C. C. v. L. & N. R. Co.*, 227 U. S. 88, 91, this Court said that the statutory right to a full hearing "imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless * * * if the finding was contrary to the 'indisputable character of the evidence' (citing cases) or, if the facts found do not, as a matter of law, support the order made" the order is void. The Court also said that if there was no evidence to show

that the rates there involved were unreasonable, "there wa no jurisdiction to make the order" and the Court cites i support of this statement, *I. C. C.* v. *Northern Pacific Rail way*, 216 U. S. 538, 544. The Court further said, "A find ing without evidence is beyond the power of the Commis sion" (p. 92). The Court examined the record in this cas and found that the findings were supported by substanti evidence. But in *U. S.* v. *B. & O. Southwestern Railway* 226 U. S. 14, Mr. Justice Holmes, speaking for the Court said that the power of the Federal Commission does no extend to ordering a connection wherever it sees fit, bu is limited to a certain and somewhat narrow class of lines In that case, the Court examined the record and found tha the facts did not, as a matter of law, support the order and it was therefore held void.

It was upon the facts and circumstances shown in th 1944 reports of the Federal Commission that this Cour sustained its orders in *Capital Transit case, supra.* Thi Court there stated, "We think that under the facts and cir cumstances shown" the findings are not subject to attack and that the Federal Commission acted within its statutory authority. That was after this Court had stated that it decision rested upon a finding that the Federal Commis sion's findings justified its order under the first exceptio under Section 203 (b). The attorneys for the United State and the Federal Commission argued in their brief that th *Capital Transit* decision constitutes a collateral estoppe to the case at bar. In its statement as to jurisdiction (page 5 and 6), they said that the District Court was misled by the distinctions between the case at bar and the *Transi* case, and that the cessation of operation by Capital Transi Company into Virginia is of no significance and that th fact that the shooting phase of the war was over was im material. In argument before the District Court, the at torney for the United States said, "I do not think the fac that the war is over makes a bit of difference" (R. 298).

and "that actually the facts are that this operation that we are talking about in this case is precisely and identically the very same thing that the Supreme Court did pass upon. * * * and I think just as a plain matter of undisputed fact that the mode of operation then was precisely the same as it is now." He further said that on comparing the facts of the *Transit* case "to the facts of the present situation, that there is absolutely no difference" (R. 300). The attorney for the Federal Commission argued "it is unquestioned, as pointed out by the Supreme Court in the other case that the same circumstances exist today" (R. 304).

Both the Federal Commission and this Court indicated by their opinions and decisions that the operation of Capital Transit Company into Virginia, and the fact that this country was engaged in the conduct of a war, and that the transportation involved was to the very nerve center of activities in the conduct of that war were of great significance. It ill behooves the appellants to try to discount the significance of the absence of those conditions in the case at bar when they attached such great significance to them in the *Capital Transit* case. In the *Transit* case this Court pointed to the significance of the evidence upon the second hearing to the effect that employees were dissatisfied with the fares, and stated that if such fact impaired the national defense program, there could be no doubt that the finding of the Commission was well supported. The Court pointed out that the fares "applied almost exclusively to workers engaged in national defense" (p. 361). This Court pointed to the concern of the Army and Navy Departments "charged with the serious responsibility of conducting a war. The empoyees worked in the very center of activities essential in that cause" (p. 362). These findings point to the significance of those facts in the time of the emergency. It is significant that three members of the Court did not agree with the Court's decision as to the right of the Federal Commission to establish through routes and joint fares

even upon a finding by the Court that at that time "Transit had voluntarily established through routes" (p. 362), and that "Transit Company itself conducted its own traffic to and from Virginia and District residential districts as one continuous journey. * * * As carried out by Transit the arrangements were the exact equivalent of transportation on a 'through route' for a joint fare" (p. 364).

The Regulatory Power Asserted was Expressly Denied to the Federal Commission.

The District Court's judgment was that the proviso in Section 216 (e) (49 U. S. C. § 316(e)) of the Act denied the Federal Commission powers it asserted. That proviso reads as follows:

> "That nothing in this part shall empower the Commission to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose whatever."

The only transportation by Capital Transit Company involved in the case at bar is from point to point within the District of Columbia (R. 103, 126). Consequently, such transportation is "intrastate transportation." The simple logic of the application of the proviso in Section 216 (e) to these undisputed facts is that the Federal Commission had no jurisdiction to enter the orders of May 7, 1947, and July 7, 1948, and no power now to enforce the order of June 22, 1945.

That this was the Congressional intent is best demonstrated by House Committee Report No. 1645 of the 74th Congress, 1st Session, accompanying S. 1629 which became Part II of the Interstate Commerce Act. Page 2 of that

report shows that the Committee on Interstate and Foreign Commerce incorporated by way of amendment the proviso in Section 216(e) herein above quoted. On page 4 of that report the Committee stated the reason for the amendment in the following language:

> "An amendment has been made by the committee which prohibits the extension of Federal regulation in intrastate transportation as exercised under authority of the decision of the Supreme Court in the *Shreveport case* and of the provisions of section 13 (4) of the Interstate Commerce Act."

Section 13 (4) referred to in the above quotation is a legislative enactment of the Shreveport doctrine whereby the Federal Commission could prescribe and regulate intrastate rates and charges of interstate *railroads*. By adoption and enactment of the amendment, Congress made clear its intention that the Federal Commission was not empowered to prescribe or regulate in any manner rates, fares and charges of intrastate transportation by *motor carrier*, or any service connected therewith.

The language of Mr. Justice Rutledge, speaking for the Court in *Panhandle Eastern Pipe Line Co.* v. *P. S. C.*, 332 U. S. 507, and the language of Mr. Justice Jackson, speaking for the Court in *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U. S. 515, is most apposite when they said that words denying application of an act plainly mean that the act shall not apply, and that it is hard to believe that a denial of jurisdiction shall be read to confer jurisdiction.

Regulatory Power Over the Transportation Involved Rests Exclusively with the District Commission

The Act creating the District Commission, 37 Stat. 974, gave it exclusive regulatory power over "the conveyance

of persons or property within the District of Columbia for hire." Congress expressly provided:

> "This section shall apply to the transportation of passengers, freight, or property from one point to another within the District of Columbia, and any common carrier performing such service; and this section shall be so applicable and be so construed as to be free from conflict with those provisions of the Constitution of the United States and the laws in pursuance thereof relating to interstate commerce." (37 Stat. 977).

The obvious purpose of providing that the quoted section should be so construed as to be free from conflict with those provisions of the Constitution and laws in pursuance thereof relating to interstate commerce was to make it abundantly clear that this was an exclusive right to the Public Utilities Commission in spite of the Federal power and of the Interstate Commerce Act and other acts then in force. This is peculiarly emphasized by Paragraph 96 of the Act creating the District Commission, which in express and unequivocal language vested powers in the District Commission and divested the Federal Commission of those powers. Paragraph 96 of that Act reads as follows:

> "That the said commission shall hereafter exercise all the powers and have all the authority now vested by law in the Interstate Commerce Commission by virtue and under the Act of Congress approved May twenty-third, nineteen hundred and eight, entitled 'An Act authorizing certain extensions to be made of the lines of the Anacostia and Potomac Railroad Company, the Washington Railway and Electric Company, the City and Suburban Railway of Washington, and The Capital Traction Company, in the District of Columbia, and for other purposes,' and said power and authority shall no longer be exercised by said Interstate

Commerce Commission: *Provided*, That the orders, rules, and regulations made by the Interstate Commerce Commission shall continue to be in force until changed, repealed, altered, or amended by the commission created by this section, which said commission is hereby given power and jurisdiction to issue and, at its pleasure, to revoke all permits or licenses, to carry this section into effect, and its rules and regulations shall be valid and binding on all public-service corporations and on all persons." (37 Stat. 995).

The foregoing grant of power is further shown by Section "Thirteenth" of the Merger Act, approved January 14, 1933, 47 Stat. 752, 757, c. 10.

That Congress did intend to leave with the District Commission powers formerly vested in the Federal Commission is abundantly supported by the history of the legislation of the Motor Carrier Act. In House Report No. 1645 to accompany S. 1629, which became the Motor Carrier Act, the Committee on Interstate and Foreign Commerce stated at page 3 thereof that there could be motor carrier regulations in the public interest only by—

> "regulation of all agencies of public transportation in such a manner that there will be the least conflict between the State regulations and interstate regulation of motor carriers.
>
> "S. 1629 fills the gap in motor-carrier regulation as between States as it is based on substantially the same principles of regulation as provided in all of the 48 States that regulate common carriers and the 42 States that regulate contract carriers."

The Committee also reported that the bill had the endorsement of the State commissions who urged its speedy adoption. The Committee on Interstate Commerce of the Senate, at page 3 of its Report No. 482 to accompany S. 1629, said the state regulatory commissions are strongly urging

Congress "to enact Federal regulation to 'stop the gaps' in State regulation and to enable them more effectively to regulate intrastate transportation." Both committees were impressed by the urgent requests of the state regulatory bodies for legislation to "stop the gaps" between state and federal regulation. We believe it is self-evident that few, if any, state regulatory commissions would have approved or endorsed the Motor Carrier Act if there had been the slightest conception of such a construction of Section 203 (b) as is asserted by the appellants in this case. The history of the legislation, as well as the language of the act, indicates that Congress did not intend a federal invasion of the powers traditionally left in the domain of local regulation and control, but that when the federal power should be exercised, it would be only under such emergency conditions as prevail in time of the prosecution of war. The Motor Carrier Act was passed in 1935 when there was no war hysteria, any more than there was war hysteria on July 7, 1948. From the passage of the act until World War II, the Federal Commission found no reason in law or fact to assert dominant power under emergency conditions, and upon the face of the record made on further hearing there is no more reason to reassert its power in time of peace when the Commission held its further hearings in the Fall of 1947. The Federal Commission did not assert its powers in "peacetime" and there is no reason for it to reassert its powers in another period of "peacetime." If a reason existed, it was the duty of the Federal Commission to state what it was and make essential findings.

Section 203 (b) Does Not Apply to the Transportation By Capital Transit Company Here Involved

Section 203 (b)(8) (49 U.S.C. § 303 (b)) provides that the Motor Carrier Act (Part II of the Act) shall not apply to transportation in interstate or foreign commerce within

a metropolitan zone "except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction; * * *."

It has never been contended that the transportation performed by Capital Transit Company is under a common control, management, or arrangement for a continuous carriage with any other carrier. There is express testimony that Capital Transit Company has no physical connection or arrangement with any of the Virginia carriers for a continuous carriage, and definite findings by the District Commission and the lower court that no such physical connection or arrangement exists (R. 61, 104, 618-619, 1261). It follows, therefore, that any exercise of federal control could not come under those provisions of Section 203 (b)(8). There is no "arrangement" or "long continued practice" and "conventional division" of rates as there were in *Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.*, 233 U.S. 479, and *Rush Common Carrier Application*, 17 M.C.C. 661, upon which the Federal Commission relied to support its order of July 7, 1948.

That section also provides that the act shall not apply except under continuous carriage, previously discussed, and that the motor carrier "is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes." Since Capital Transit Company does not operate into Virginia, it could not be engaged in "intrastate transportation" in the State of Virginia. The entire length of the interstate route over which the interstate passengers here involved are trans-

ported is from points in the District of Columbia to points in the State of Virginia. Capital Transit Company could not operate "the entire length of such interstate route or routes" since it does not operate into Virginia. It cannot operate "in accordance with the laws of each State" (Virginia) without operating into that state.

Clearly, when Congress enacted Section 203 (b)(8) it contemplated transportation by companies that could be subject to the act and could operate lawfully in intrastate transportation in each jurisdiction involved and subject to the laws of each state over the entire interstate route.

In its report of June 12, 1944, 238 I.C.C. 559, at page 566, the Federal Commission said that in view of the facts then found, Capital Transit Company "is not engaged in any intrastate operations in Virginia, either authorized, or unauthorized, by that State, over its entire interstate routes between the Pentagon and the District." That finding was made at a time when Capital Transit did operate buses into Virginia. It then had "its interstate routes" as the Federal Commission found and as this Court found in 325 U. S. at page 364. If it was not engaged in intrastate operation in Virginia when it was physically operating there, it could not now be "lawfully engaged in the intrastate transportation" over an "interstate route." The Federal Commission's finding clearly indicates that the exception to the exemption in Section 203 (b)(8) was not intended to apply to the transportation by Capital Transit Company from point to point within the District.

There is another reason why the transportation by Capital Transit Company involved in the case at bar does not come within Section 203 (b)(8). The very language of the section, as well as the history, shows it was not intended to apply to urban transportation, but to interuban transportation. Senator Wheeler, who handled the legislation in the Senate, explained the purpose and intention of the exclusion from the Motor Carrier Act in Section 203 (b)(8). He

said an exemption from the provisions of the act is made unless the Federal Commission finds "that the law cannot be made to work without its inclusion to some extent, of the transportation of property locally or between contiguous municipalities or commercial zones, as between New York City and New Jersey, and also for instance, as between Washington and Alexandria, and other contiguous cities where the transportation is regulated by the local governments themselves" (Vol. 79, Congressional Record, at page 5650). Senator Wheeler stated that the purpose of the exemption was to avoid duplication of regulation over bus operations.

The Federal Commission said the transportation between the District and the Virginia installations "is urban, mass transportation between points in the District and points in Virginia just beyond the District-Virginia line, and is the same in all essential characteristics as the transportation between residential areas of the District and commercial and Government establishments in the District. • • • These installations represent to all intents and purposes an extension of the main business area of Washington" (256 I.C.C. at page 782). It reaffirmed this statement in its June 12, 1944, report (258 I.C.C. at page 568).

The appellants contend that the transportation performed by Capital Transit within the District of Columbia is "interstate commerce" as defined in Section 203 (a)(10). But the exception to the exclusion from the Motor Carrier Act under Section 203 (b)(8) applies only to "transportation of passengers or property in interstate or foreign commerce." Congress did not place within the exception under Section 203 (b)(8) "interstate commerce" as that term is used in Section 203 (a)(10). It provided for an exception to the exemption only for "transportation" in interstate commerce. Capital Transit Company does not "transport in interstate commerce." It follows that the transportation from point to point within the District of Colum-

bia by Capital Transit Company is not the kind of transportation which the Federal Commission could regulate under Section 203 (b)(8).

The language of Section 203(b)(8) is specific. It does not provide that when findings are made as required by clause (7a) that Part II of the Act shall be applied to one "*engaged* in interstate commerce." The section does not apply to "interstate commerce." It applies, as Congress expressly stated, to *transportation* in interstate commerce.

The Federal Commission found that on March 31, 1947, "the Transit Company discontinued physical operations in Virginia in connection with the transportation of passengers between points in the District and the Pentagon Building." 270 I.C.C. at page 652. This long and laborious finding about the Company having "discontinued physical operations in Virginia in connection with the transportation of passengers between points in the District and the Pentagon Building" means nothing more nor less than that since March 31, 1947, Capital Transit Company "has not engaged in transportation in interstate commerce," or "has not transported passengers to Virginia."

It will be observed that Congress did not use the words "*engaged* in interstate commerce" in making applicable Section 203(b)(8). It used apt words to express its intention that the section should be applicable only to "*transportation* in interstate commerce." Congress was careful in its choice of words and phrases. It did not extend the applicability of the section beyond "transportation."

If Congress had intended to make Section 203(b)(8) applicable to anything other than "transportation" in interstate commerce, it would have said so in apt words, or it would have added after the word "transportation," the phrase "or for any service connected therewith," as it did in Section 216(e); or it would have used the phrase "and all other matters relating to or connected with the transportation of passengers in interstate or foreign commerce,"

as it did in Section 216(a) and in Section 216(b). (49 U.S.C. § 316(a) and 316(b)).

If Congress had intended to make Section 203(b)(8) applicable to "interstate commerce" as those words are employed in Section 203(a)(10), as the appellants contend in this case, it would have used the words "engaged in interstate or foreign commerce," as it did in Section 216 (d) (and in Section 22 (b) of the Transportation Act of 1940, 54 Stat. 924, in amending Section 216(d)), and as it did in Section 222(e) (49 U.S.C. § 322(e)). If Congress had intended the application of Section 203(b)(8) to "interstate commerce" as contended for by the appellants, it could have used such phrases as "practice affecting" such service or the "service thereunder," as it did in Section 216(g) (49 U.S.C. § 316(g)).

Congress did not make the section applicable to transportation "and all service in connection therewith," as it did in Section 217(a) and 217(b); or "practice affecting" charges, as it did in Section 218(a) as originally enacted; or the words "for any service rendered or to be rendered in the transportation," as it did in Section 23(a) of the Transportation Act of 1940, 54 Stat. 925, amending Section 218(a). Nor did Congress use the expression "and practices relating thereto," as it did in Section 22(d) of the Transportation Act of 1940, 54 Stat. 924, amending Section 216(i) of the Act (49 U.S.C. § 316(i)). If Congress had intended the application of Section 203(b)(8) in the manner argued by the appellants, it could have used the phrase "the transportation of passengers or property or in connection therewith" as it did in Section 23(b) of the Transportation Act of 1940, 54 Stat. 925, in amending Section 218(b); or it would have used such language as "any service connected with such transportation," as it did in Section 225 of the Act (added by Section 26(a) of the Transportation Act of 1940, 49 U.S.C. § 224(a)).

The limited use of the word "transportation" in Section 203(b)(8) is emphasized and made more significant by em-

ployment in both the exception of clause (8) and in the proviso of clause (8) of the words "such transportation." In both of these instances, Congress evidenced an intent to limit the applicability of Section 203(b)(8) to "transportation." Otherwise, it would have used in one or both of such clauses language such as "such interstate commerce," or other language to show an intent of a broader meaning. But nowhere in Section 203(b)(8) did Congress use the broad language or expressions found in other sections of the Act to indicate an intention to cover "interstate commerce," as contended for by appellants. If Congress intended the broad application contended for by the appellants, it seems strange that it did not use appropriate language to do so when it did use such language in other sections intended to imply to "interstate commerce."

That Congress intended the application of Section 203 (b)(8) only to "transportation" is further indicated by the proviso in clause (8) that it shall not apply if the motor carrier engaged in transportation "over *regular or irregular route or routes* in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such *interstate route or routes* in accordance with the laws of each State having jurisdiction" (emphasis supplied). Capital Transit Company does not have an "interstate *route*." Since it does not transport passengers into Virginia, it can not have an interstate *route*. The language just quoted is a clear demonstration that Congress intended that Section 203(b)(8) should be applied only to one engaged in "transportation" in interstate over an "interstate route."

Even if the Transportation here Involved is Subject to Section 203 (b)(8), the Order is Void for Lack of Basic Findings of Fact.

Section 203(b)(7a) (49 U.S.C. § 303(b)) would make operative the exception to the exemption under 203(b)(8)

only after the Federal Commission shall from time to time "find" that the application of the exception is necessary to carry out the policy laid down by the act. To make the exception applicable there must be a finding and statement of the basic facts of every element necessary for the Federal Commission to exercise the asserted power. The report and findings upon which the Federal Commission predicated the order of July 7, 1948, neither recites the evidence which is essential to every element required by Section 203(b)(7a) and (8), nor does it contain the essential findings to support the order. It is true that the Federal Commission did state certain conclusions, but they are merely "conclusions" not based upon evidence. There is no disclosure of the facts upon which the conclusions could be based. If there was no evidence upon which essential findings could be made, "there was no jurisdiction to make the order. • • • A finding without evidence is beyond the power of the Commission" *I.C.C.* v. *Louisville and Nashville R. Co.*, 227 U.S. 88, 92. The requirement of essential findings is jurisdictional. *U.S.* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 504-505.

In its report of July 7, 1948, the Federal Commission reached the ultimate conclusion by stating "As previously found, the commercial zone exemption authorized in Section 203(b)(8) of the Interstate Commerce Act is not applicable" (270 I.C.C. 655, R. 129). This ultimate conclusion does not point to any evidence in support of such conclusion. The report contains no basic finding of facts upon which such a conclusion could be predicated, and it is contrary to the testimony of record (R. 640-641, 647). The facts "previously found"—in 1944—did not exist when the report of July 7, 1948, was rendered. Consequently, there must be a disclosure of facts to support the order.

The Federal Commission made an ultimate conclusion of law by stating that the joint fare applies to transportation "that falls within the definition of 'interstate commerce'

contained in Section 203(a)(10)" (270 I.C.C. at page 655, R. 129). There is no evidence in the record on further hearing to support such finding or conclusion. The Federal Commission failed to make basic findings necessary to support its ultimate conclusion of law.

An ultimate conclusion of law was stated that the mere fact that Transit Company's operations are now confined only to the District of Columbia "does not have the effect of depriving us of jurisdiction" (270 I.C.C. at page 655, R. 129). In support of the conclusion of law, it cites *Baer Bros. Mercantile Co.* v. *Denver & R. G. R. Co.*, 233 U. S. 479, and *Rush Common Carrier Application*, 17 M.C.C. 661. As elsewhere pointed out in this brief, the facts in those two cases are at complete variance with the facts of record now before this Court. It is significant that the attorneys for the appellants do not seek to support the Federal Commission's findings upon those two decisions. They utterly ignored them in their brief.

The Federal Commission expressed a legal conclusion that the transportation here considered clearly falls within the category described in the first excerpt that it quotes from *U.S.* v. *Yellow Cab Co.*, 332 U.S. 218, and found in 270 I.C.C. at page 655 (R. 130). The Federal Commission failed to point to any evidence in the record which supports its conclusion, and ignores the testimony to the contrary found at Record pages 618 and 619. It has made no basic finding of facts to support the conclusion reached.

The Federal Commission stated that in "prior reports" it had found that aside from any question concerning commercial zone exemption, application of Part II of the act was necessary to carry out the national transportation policy and that this finding was expressly sustained in *U.S.* v. *Capital Transit*, *supra* (270 I.C.C. at page 656). This finding from prior reports is based upon evidence which is shown to be contrary to the facts existing at the time the report of July 7, 1948, was issued, and it is contrary to tes-

timony of record, as pointed out in this brief contrasting existing facts with the facts existing at the time the prior reports were made.

The Federal Commission stated that at the last further hearing the Director of Civilian Personnel of the Army Department testified "along the same lines" as the evidence presented by the departments at the prior hearings (270 I.C.C. at 657, R. 132). As elsewhere pointed out in this brief, the testimony of the Director was quite different from testimony on the same subject in the 1944 proceedings.

An ultimate conclusion was stated that the national transportation policy contemplates a national transportation system that will, among other things, meet the needs of national defense, and it applies in peacetime as well as in wartime (270 I.C.C. at 657, R. 132). The Federal Commission fails to point to evidence to justify in peacetime the removal of the exemption in 203(b)(8), and fails to make basic and essential findings to support its conclusion. It does not disclose how national defense is aided by controlling 1.09% of Capital Transit Company's District revenues. It is common knowledge, which this Court is asked to notice, that this country is not geared to war activities in time of peace. The public economy of peacetime bears no relation to that of "conducting a war." To take "war measures" in time of peace requires more than a desire to hold on to such measures. The Federal Commission doesn't seem quite clear as to the source of the jurisdiction asserted, because it said it may be under the commercial zone exemption or to carry out the national transportation policy "or upon both grounds" (270 I.C.C. at 657). It made no basic findings on either ground.

The Federal Commission made an ultimate conclusion that continued regulation of all fares in issue was necessary to carry out the national transportation policy, and overruled the motion of the District Commission to vacate its order or to modify it so as to exempt from its effect trans-

portation by Capital Transit Company wholly within the District of Columbia (270 I.C.C. at page 657, R. 132). It failed to discuss any testimony in support of its conclusion. In fact, its conclusion is contrary to the testimony of record (R. 640-641, 647). The report is lacking in basic findings necessary to support the conclusion stated. There is not a word of testimony in the record on further hearing to show how federal regulation of transportation from point to point in the District of Columbia would affect the national transportation policy in time of peace. There is not a word of testimony showing the relationship of local transportation to the national transportation, or a national transportation system.

The Federal Commission concluded that certain fares stated by it "would be reasonable" (270 I.C.C. at pages 662-663, R. 138). It made this finding without any evidence to support it and without making findings essential to support its conclusion. The conclusion reached is contrary to evidence of record. It failed to make any findings of the effect of the rates upon the revenues of Capital Transit Company (or the other companies). It made no findings that such revenues would constitute a fair return on the value of property used, or even pay the cost of operation. It falls squarely within the condemnation of Mr. Justice Black, speaking for the Court in *State of North Carolina v. U.S.*, 325 U. S. 507.

The Federal Commission's conclusion as to the divisions of fares from the joint fare was made upon the simple and easy statement that the record "affords no basis for changing the divisions" upon which the carriers had agreed under compulsion of the Commission and this Court in the 1945 opinion to aid in the prosecution of a war (270 I.C.C. at page 663). It pointed to no evidence as to what constitutes a proper division of the fare. It made no basic finding of facts to support its conclusion.

The Federal Commission made a finding of a joint bus and street-car fare, 270 I.C.C. at page 664, without stating

a basis for the fare structure, and contrary to evidence that the fare did not give the Company its costs of operation and a return upon its property (R. 373). It made no effort to find the cost of transportation within the District of Columbia.

Likewise, it made a finding of the reasonable divisions of fares which allowed Capital Transit Company 5.83¢ for a period when there was evidence of record that such a rate was confiscatory (R. 158, 373, 374, 934, 854, 857), and contrary to a finding by the District Commission that a 10¢ cash fare for transportation within the District of Columbia was inadequate (R. 22, 26, 31, 40, 41, 1258, 1259, 1260, 1271, 1272). The division of 7 cents of the new fare was also made contrary to such evidence and without essential finding of facts.

The statements of deductions, inferences and ultimate conclusions come squarely within the condemnation of this Court in *State of N. C. v. U. S.*, 325 U.S. 507, 511, 512, 520; *U. S. v. B. & O. R. Co.*, 293 U.S. 454, 462-464; *State of Florida v. U. S.*, 282 U.S. 194; *U. S. v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499; *Colorado-Wyoming Gas Co., v. F. P. C.*, 324 U.S. 626, 634; *U. S. v. Carolina Freight Carriers Corp.*, 315 U. S. 475, 488, 489. The lack of basis or essential findings to show every element necessary to bring the transportation within federal control renders the Federal Commission's order void. It does not measure up to that high standard required by decisions of this Court for the exercise of federal power in the area that is traditionally within the domain of state power.

The Small Volume of Transportation Involved Does Not Have Such Close and Substantial Relation to Interstate Commerce as to Burden It or Obstruct Its Free Flow.

The report of July 7, 1948, shows that for the four-month period, June to September, 1947, the revenue received by

Capital Transit Company under the joint fares established by the Federal Commission "was 1.09 percent of total revenue from District operations during the same period" (270 I.C.C. at page 661, R. 137). It is difficult to see how traffic that produces only 1.09% of District revenues could have any effect upon the national transportation system, or how it affects "the needs of the commerce of the United States, of the Postal Service, and of the national defense." The Federal Commission failed to state what the effect is. The entire business of Capital Transit Company is an insignificant part of national transportation, and there is a complete lack of showing how such small volume could have that close and substantial relationship to interstate commerce as to obstruct its free flow. The record shows that Capital Transit's system is not connected with any other transportation system (R. 61, 104, 618-619, 1261).

The insignificant volume of the so-called joint fare transportation performed by Capital Transit Company within the District of Columbia does not bear that close and substantial relationship to interstate commerce upon which this Court has held that intrastate activities burden it. It does not bear that close and intimate relationship to interstate commerce found by this Court in *Santa Cruz Fruit Packing Co.* v. *N. L. R. B.*, 303 U.S. 453, 464, or in *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37, or the *Shreveport* case, 234 U.S. 342, 351, or *Railroad Commission of Wisconsin* v. *C., B. & Q. Railroad Co.*, 257 U.S. 563, 588. The transportation by Capital Transit Company here involved is not so "intimately associated" with interstate commerce as that found by this Court in *Illinois Natural Gas Co.* v. *Illinois Public Service Co.*, 314 U.S. 498, 509, where the Court found that the commerce there involved "would so affect its volume moving into the state and distribution among the states," as to "materially affect interstate commerce." It is not of the substantial character this Court found in *U. S.* v. *N. Y. C. R. Co.*, 272 U.S. 457, 464.

The insignificant transportation performed by Capital Transit Company involved in the case at bar constitutes a smaller part of the commerce than was involved in *Milk Control Board* v. *Eisenberg Farm Products*, 306 U.S. 346, 353, where Mr. Justice Roberts, speaking for the Court, said that only a small fraction of milk produced by farmers in Pennsylvania was shipped out of the Commonwealth. In that case the Court said there was a comparatively large field remotely affecting and wholly unrelated to interstate commerce within which the statute there involved operated. It concluded by saying,

> "These considerations we think justify the conclusion that the effect of the law on interstate commerce is incidental and not forbidden by the Constitution, in the absence of regulation by Congress."

The Court discussed the cases relied upon by the respondent in that case to show that the act and regulations were in violation of the Commerce Clause. But the Court pointed out that *Lemke* v. *Farmers' Grain Co.*, 258 U.S. 50, condemned a state statute affecting commerce where over 90 per cent of the commerce was interstate; that *Shafer* v. *Farmers' Grain Co.*, 268 U.S. 189, dealt with a state law intended to regulate commerce almost wholly interstate in character; and in *Baldwin* v. *Seelig*, 294 U. S. 511, the Court condemned an enactment aimed solely at interstate commerce which the Court found to constitute in effect a tariff barrier. In *U. S.* v. *New York Central R. Co.*, 272 U. S. 457, 464, Mr. Justice Stone, later Chief Justice Stone, speaking for the Court, sustained an order of the Federal Commission over objection that it affected both interstate and intrastate transportation where approximately 75 per cent of the transportation was interstate. The Court said the effect of the intrastate business—approximately 25 per cent—was incidental to the interstate business. The transportation by Capital Transit Company here involved is wholly incidental to its local transportation and is only re-

motely related to the interstate transportation rendered by the Virginia companies.

In *Eichholz* v. *Public Service Commission of Missouri*, 306 U.S. 268, 622, Mr. Chief Justice Hughes, speaking for the Court, where Eichholz contended that his business was interstate and not subject to state regulation, said the extent of his business in violation of the state permit "was a considerable portion of his operations and justified the action of the Commission" (p. 275). The dissent of Mr. Justice Murphy, joined in by Mr. Justice Black and Mr. Justice Douglas, in *Morris* v. *McComb*, 332 U.S. 422, 439, where only 3.65 per cent of the commerce involved was interstate, referred to this small percentage as the "slender thread" by which the Federal Commission had power over the hours of employment of operators of motor vehicles instead of the regulation being under the Fair Labor Standards Act.

In *N. L. R. B.* v. *Bradford Dyeing Association*, 310 U. S. 318, 325, the volume of commerce involved "about ninety percent of all goods processed" and there, Mr. Justice Black speaking for the Court, held that the free flow of interstate commerce would be obstructed by a strike forcing the closing of the business involved.

In the light of these authorities, it is difficult to see that the infinitesimal volume of the joint traffic of Capital Transit Company involved in the case at bar could burden interstate commerce, or could seriously affect a national transportation system or a national transportation policy. In any event, the administrative body has not made the requisite findings to support the inconclusive deductions stated by it.

The Question of Confiscation Is Not Properly Before this Court.

The appellants in case No. 40 attempt to raise the question of confiscation of the fares involved. That question

was raised before the Federal Commission and raised by the pleadings before the District Court, but that court neither considered nor acted upon that question.

No impelling reason is advanced why this Court should pass upon a question not considered or decided below. If this Court should consider the question of confiscation, it is pertinent to call attention to uncontradicted testimony that the division of the joint fare prescribed by the Federal Commission for Capital Transit Company is below the cost of service and is confiscatory. The Federal Commission prescribed a division to Capital Transit of 5.83¢ effective until August, 1948, and 7¢ after that date. The District Commission, after a full and complete investigation into the cost of transportation within the District of Columbia, on May 8, 1947, issued its opinion and order (R. 19-42), in which it found that the adjusted income statement of Capital Transit Company showed that for the year 1947 the Company would have "an obviously inadequate return," and that during the two months of 1947 "the Company failed to meet its operating expenses by $60,083, and, in addition, was still faced with interest charges of $96,799. The net effect after providing for all charges is the loss of $149,297 during the first two months of the current year" (R. 31-32). As a result of the investigation, the District Commission authorized Capital Transit Company to discontinue the sale of tokens, thereby establishing a cash fare of 10¢, and raised the price of the weekly pass from $1.25 to $1.50 (R. 41). The record further shows that even with the increase in rates in May, 1947, Capital Transit Company was not making an adequate return, and after another complete investigation and hearing, the District Commission on October 1, 1948 (R. 1244-1273), issued its further order raising the cash fare from 10¢ to 13¢ and the price of the weekly pass from $1.50 to $1.75, because it found "that the return currently being earned by the Company is inadequate; that a continuation of earnings at their present level would be

prejudicial to the credit standing of the Company." (R. 1260.) The District Commission found that the increases in fares which it had granted on May 11, 1947, were, in spite of substantial economies resulting from rescheduling of services, "nullified by mounting costs of operation, due in large measure, to increases in the wages of operators" (R. 1272).

Furthermore, Capital Transit's Vice President and Comptroller testified before the Federal Commission that the revenues Capital Transit received from existing fares and charges were insufficient to cover the cost incurred and to provide a fair return on its investment used in the public service (R. 373, 374). Exhibit No. 135 which was presented before the Federal Commission on further hearing (R. 806) is reproduced at Record page 934 and shows that the total cost for carrying a passenger under the joint rate ticket prescribed by the Federal Commission, based on operations for the four months of June to September, 1947, adjusted for the wage rate increase, was 11.664¢ at a time when the Federal Commission had prescribed a division of fare to the Company of 5.833¢.

The answer to this undisputed testimony is the argument of the appellants that the evidence presented "related entirely to its average expense per passenger for all of its District operations" (p. 30 of the brief). The costs shown in the evidence represents a cost for transportation within the District of Columbia. The transportation involved in the case at bar is transportation within the District of Columbia. Consequently, the average expense within the District of Columbia should be the measure of the cost of that transportation. The passengers who have used the joint fare are passengers that come from or go to all parts of the District of Columbia. Consequently, they are the District of Columbia costs that must be used to determine the revenue to be collected for such transportation. Evidence before the Federal Commission on further hearing shows that

the cost to Capital Transit Company of transporting these passengers who use the joint ticket is the same as that for transporting any other passenger within the District. They all get the same service and use the same facilities (R. 859).

CONCLUSION

It is respectfully submitted that for the foregoing reasons, the judgment of the District Court should be affirmed and the appeals be dismissed.

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